Filed 3/11/19 Rabobank, N.A. v. Almquist CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

RABOBANK, N.A., Plaintiff and Respondent, v. ALAN ALMQUIST et al., Defendants and Appellants.	C079605 (Super. Ct. No. NC54062)

Eric and Judy Almquist obtained a $500,000 line of credit from Butte Community Bank secured by a deed of trust on real property in Oroville, California (the property). Eric and Judy then transferred title of the property to North Star Ranch, Inc. (North Star), a corporation created by members of the Almquist family for estate planning purposes. After Eric and Judy defaulted on the line of credit, Eric, Judy and Eric's brother Alan signed long-term lease agreements with North Star pertaining to the property, and Eric and Judy filed for bankruptcy.

Rabobank, N.A. (Rabobank), the successor of Butte Community Bank, purchased the property at a non-judicial foreclosure sale and filed an unlawful detainer action to take possession of the property. Following a trial in the unlawful detainer action, the trial court ruled in favor of Rabobank, finding, among other things, that the purported lease agreements were created to perpetrate a fraud on Rabobank and thus were void, Eric lacked credibility, Rabobank had perfected its interests, the non-judicial foreclosure was proper, and there was no violation of the bankruptcy stay.

Eric and Alan now contend the trial court erred in (1) awarding judgment of unlawful detainer, (2) denying the motion to disqualify Rabobank's counsel, and (3) granting Rabobank's motion to strike the Almquist's third affirmative defense asserting that the Almquist's leases and life estates were superior to Rabobank's title.

Finding no merit in Eric and Alan's contentions, we will affirm the judgment.

BACKGROUND

Eric, Judy and Alan incorporated North Star in 1990 to hold title to the property. The sole and equal owners of North Star were the family trusts established by the Almquists for the benefit of their children. Eric, Judy, Alan and other members of the Almquist family were the only officers and directors of North Star.

North Star purchased the property for $65,000. Alan paid $15,000 of the purchase price and North Star signed a $50,000 promissory note secured by the property. At some point Eric, Judy and Alan paid off the note. Eric and Judy resided on the property and Alan sometimes resided there.

In June 2007 Eric and Judy executed a grant deed as President and Secretary of North Star, conveying title of the property from North Star to Eric and Judy, husband and wife, as joint tenants. On the same day they obtained a $500,000 variable rate home equity line of credit from Butte Community Bank secured by a deed of trust on the property. The deed of trust identified Eric and Judy as the trustors, Butte Community Bank as the lender and beneficiary, and Mid Valley Title and Escrow Company as the

trustee. The deed of trust was recorded in Butte County in June 2007. The line of credit agreement identified Eric and Judy as the borrowers and provided that all indebtedness on the credit line, including a balloon payment, was due on June 14, 2012.

In the summer of 2007, Eric and Judy executed a grant deed transferring title of the property back to North Star. The grant deed was recorded in Butte County in August 2007.

Rabobank purchased the assets of Butte Community Bank from the Federal Deposit Insurance Corporation (FDIC) in August 2010, pursuant to a Purchase and Assumption Agreement. Section 3.1 of that agreement provided that with the exception of certain assets not applicable here, "the Assuming Institution hereby purchases from the Receiver, and the Receiver hereby sells, assigns, transfers, conveys, and delivers to the Assuming Institution, all right, title, and interest of the Receiver in and to all of the assets . . . of the Failed Bank . . . ." The Agreement identified Rabobank as the Assuming Institution and FDIC as the Receiver of Butte Community Bank.

Eric and Judy were unable to make payments on their line of credit. In February 2011, WT Capital Lender Services recorded a notice of default and election to sell under the deed of trust. Eric purportedly tried to cure the default, sell the property, and negotiate a halt to the foreclosure. Rabobank executed a substitution of trustee, substituting WT Capital Lender Services as the new trustee under the deed of trust. The substitution of trustee was recorded in Butte County in March 2011.

In October 2011, the FDIC executed an assignment of the deed of trust and note to Rabobank pursuant to the Purchase and Assumption Agreement. The assignment was recorded in November 2011. That same month, Eric sent a letter to Rabobank saying it was not financially feasible for him to remain in his home and proposing a short sale. Eric attempted to sell the property to a family friend. In February 2012, WT Capital Lender Services executed a notice of default and election to sell under the deed of trust. The notice was recorded that month.

A memorandum of lease purporting to lease the property to Eric and Judy as an estate for life was recorded in Butte County in May 2012. Eric and Judy filed a Chapter 7 bankruptcy petition the next month, one day before a scheduled trustee's sale of the property. Eric and Judy claimed they had a 55-year lease on the property.

Rabobank purchased the property in a trustee's sale in August 2012. A trustee's deed upon sale was recorded that month. Brea Roundtree, a representative of Rabobank, sent Eric and Judy a "Residential tenant notification of foreclosure and new owner." Roundtree asked Eric and Judy to send Rabobank proof of their tenancy and the monthly rent, but she did not receive a response. She then sent a "Residential tenant 90-day notification to vacate" by certified mail to Eric and Judy. The document again requested copies of any leases. Judy signed for the document, indicating receipt on August 29, 2012. Roundtree did not receive any leases in response to her request.

Eric and Judy received a bankruptcy discharge in October 2012. The bankruptcy court granted Rabobank's motion for relief from the automatic stay regarding the interest of the trustee. Counsel for Rabobank sent notice to Eric, Judy, and any other occupants of the property that they had 90 days to vacate. Rabobank then filed an unlawful detainer action against Eric, Judy and North Star. Alan subsequently made himself a defendant in the action. Eric, Judy and Alan asserted they had a leasehold interest in the property that was superior to the deed of trust. North Star filed a cross-complaint against Rabobank challenging the unlawful detainer action.

Rabobank received copies of two leases in January 2013, one for Alan and another for Eric and Judy. Alan signed a lease agreement for the "main house" on behalf of landlord North Star and also as the tenant. The term was March 30, 2011, through March 30, 2026. The lease required Alan to pay $12,000 in rent per year beginning in March 2014, and added that Alan would receive a credit of $40,000 toward rent for 2011 through 2014 in return for his payment of "costs for acquisition of the property."

Alan signed the lease to Eric and Judy on behalf of landlord North Star. That agreement required Eric and Judy to pay $200 per month for rent; an addendum said the fair market rent was $900 per month and Eric and Judy would receive a $700 monthly credit for working on the property. Another addendum said Eric and Judy had an estate for life that would continue to their daughter and grandchildren.

At the trial in the unlawful detainer action, Alan testified the original leases were oral and were created in 1991, but the agreements were put in writing in 2011. Eric admitted the leases were executed after the default on their line of credit, but he claimed that when he applied for the line of credit, he told Butte Community Bank the property was owned by North Star and he and Alan had leases. Eric said the bank would not make a loan to North Star, but the bank suggested Eric and Judy could take title to the property, use the property to secure the loan, and then deed the property back to North Star after the loan.

The trial court found in favor of Rabobank, finding that the purported leases and life estates were void because they were created to perpetrate a fraud on Rabobank, to halt the foreclosure, and to create an issue in the bankruptcy which did not exist. It also found that Eric lacked credibility and Rabobank perfected its interest in the note and deed of trust. It ruled the non-judicial foreclosure was proper, there was no violation of the bankruptcy stay, and service of the notice to quit was also proper.

DISCUSSION

I

Eric and Alan contend the trial court erred in awarding judgment of unlawful detainer. We disagree.

Eric and Alan argue they were entitled to litigate whether Rabobank had perfected its title. Although unlawful detainer actions are summary proceedings ordinarily limited to claims bearing directly on the right of immediate possession which do not resolve questions of title (*Vella v. Hudgins* (1977) 20 Cal.3d 251, 255 (*Vella*)), an exception is

found in Code of Civil Procedure section 1161a, subdivision (b)(3), which provides that "a person who holds over and continues in possession of . . . real property after a three-day written notice to quit the property has been served upon the person . . . may be removed therefrom as prescribed in this chapter . . . [w]here the property has been sold in accordance with Section 2924 of the Civil Code, under a power of sale contained in a deed of trust executed by such person . . . and the title under the sale has been duly perfected."

Code of Civil Procedure section 1161a, subdivision (b)(3) "provides for a narrow and sharply focused examination of title." (*Vella, supra,* 20 Cal.3d at p. 255.) Rabobank must prove that the property was sold in accordance with Civil Code section 2924 and that title under the sale was perfected. (*Vella*, at p. 255.) However, matters affecting the validity of the trust deed or primary obligation itself, or other basic defects in Rabobank's title, are not properly raised in the summary proceeding for possession or concluded by the judgment. (*Cheney v. Trauzettel* (1937) 9 Cal.2d 158, 160; *Mehr v. Superior Court* (1983) 139 Cal.App.3d 1044, 1049-1050; *Evans v. Superior Court* (1977) 67 Cal.App.3d 162, 166-167, 171.)

Eric and Alan assert various challenges based on the foregoing law, which we address in turn.

A

Eric and Alan claim Rabobank did not have authority to substitute WT Capital Lender Services as the trustee under the deed of trust in 2011, because the FDIC did not execute an assignment of the deed of trust to Rabobank until later. They argue the notice of default, notice of trustee's sale, and trustee's deed upon sale signed or recorded by WT Capital Lender Services were void. The argument lacks merit.

Rabobank purchased the loans from the FDIC on August 20, 2010. Rabobank then substituted WT Capital Lender Services as the trustee under Eric and Judy's deed of

trust. Rabobank was authorized to execute the substitution of trustee as the successor in interest of Butte Community Bank. (Civ. Code, § 2934a, subd. (a)(1).)

A trustee named in a recorded substitution of trustee is deemed authorized to act as trustee for all purposes from the date the substitution is executed. (Civ. Code, § 2934a, subd. (d).) The substitution was dated February 24, 2011 and was recorded on March 7, 2011. As the new trustee, WT Capital Lender Services was authorized to issue the notice of default dated February 16, 2012, conduct the non-judicial foreclosure, and execute the trustee's deed upon sale dated August 16, 2012. (Civ. Code, §§ 2924, subds. (a)(1) & (a)(6), (a)(3), 2934a, subd. (d); *PV Little Italy, LLC v. MetroWork Condominium Assn.* (2012) 210 Cal.App.4th 132, 158, fn. 14.)

B

Eric and Alan next argue Rabobank's title to the property is void because Rabobank conducted the trustee's sale without obtaining relief from the automatic stay in the bankruptcy action.

"[T]he filing of a bankruptcy petition creates the bankruptcy estate, which includes 'all legal or equitable interests of the debtor in property as of the commencement of the case.' [Citation.] The bankruptcy filing acts as an automatic stay of 'any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate. . . .' [Citation.]" (*Eden Place, LLC v. Perl* (9th Cir. 2016) 811 F.3d 1120, 1127 (*In re Perl*).)

The leasehold interest of a debtor is property of the debtor's bankruptcy estate and subject to the automatic stay. (*In re Babco, Inc.* (W.D. Pa. 1983) 28 B.R. 656, 658.) State law determines whether a debtor has a valid leasehold interest. (*In re Perl, supra,* 811 F.3d at p. 1127; *In re Babco, Inc., supra,* 28 B.R. at 658.) A debtor's leasehold interest is not subject to the automatic stay provisions if the lease is void under state law. (*In re Babco, Inc., supra,* 28 B.R. at p. 658.)

A lawful object is an essential element of a contract. (Civ. Code, §§ 1550, 1595, 1596.) An agreement made for the purpose of defrauding the creditors of one of the parties to the agreement is void and unenforceable. (*Severance v. Knight Counihan Co.* (1947) 29 Cal.2d 561, 567-568; *Rossen v. Villanueva* (1917) 175 Cal. 632, 633-636.) Here, the trial court determined the leases were not genuine, they were an attempt to halt the foreclosure, ward off potential bidders at the trustee's sale, create an issue in the bankruptcy that did not exist, and prevent Rabobank from possessing the property. We review the trial court's findings of fact for substantial evidence and its conclusions of law de novo. (*Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419, 1425-1426.) "In assessing whether any substantial evidence exists, we view the record in the light most favorable to respondents, giving them the benefit of every reasonable inference and resolving all conflicts in their favor. [Citation.] '[I]t is not our role to reweigh the evidence, redetermine the credibility of the witnesses, or resolve conflicts in the testimony, and we will not disturb the judgment if there is evidence to support it.' [Citations.]" (*Williamson v. Brooks* (2017) 7 Cal.App.5th 1294, 1299-1300.)

Substantial evidence supports the trial court's findings. Eric and Judy, as husband and wife, were the owners (not lessees) of the property in June 2007, when they obtained the loan from Butte Community Bank. No leases had been recorded. Eric did not mention any lease to Rabobank when he attempted to negotiate a halt of the foreclosure and a short sale in 2011. The purchase offers accepted by the Almquists in 2011 and 2012 and Rabobank's April 2012 preliminary approval of a proposed short sale likewise made no mention of any lease upon the property, all indicating that the Almquists did not disclose the existence of any such interest. The written leases were only executed after Eric and Judy defaulted on their line of credit, and the memorandum of lease was only recorded after WT Capital Lender Services recorded a notice of default and issued a notice of sale. Eric and Judy filed for bankruptcy one day before the then-scheduled trustee's sale. Eric and Alan testified about the leases at trial, but the trial judge found

Eric not credible and impliedly rejected Alan's testimony about the purported leases. Further, Eric and Judy made differing representations about the terms of their lease. All of the foregoing circumstances support a conclusion that the leases were void because they were created to stop the foreclosure and prevent the creditor/new owner's possession of the property. Because Eric and Judy possessed no valid leasehold interest, the acts taken to foreclose upon the property did not violate the automatic stay provisions.

C

Eric and Alan next contend Rabobank did not duly perfect its title because the trustee's sale was held without first serving a Civil Code section 2966 balloon payment notice.

Civil Code section 2966 applies to transactions "for the purchase of a dwelling for not more than four families in which there is an arranger of credit, which purchase includes an extension of credit by the vendor." (Civ. Code, §§ 2956, see 2966, subd. (a).) The home equity line of credit from Butte Community Bank to Eric and Judy was not a loan for the "purchase" of a dwelling and thus is not a transaction covered by Civil Code section 2966.

Civil Code section 2924i also does not apply in this context. That section contains provisions virtually identical to those in Civil Code section 2966 and applies to "loans secured by a deed of trust . . . on real property containing one to four residential units at least one of which at the time the loan is made is or is to be occupied by the borrower if the loan is for a period in excess of one year and is a balloon payment loan." (Civ. Code, § 2924i, subd. (a).) "A 'balloon payment loan' is a loan which provides for a final payment as originally scheduled which is more than twice the amount of any of the immediately preceding six regularly scheduled payments . . . ." (Civ. Code, § 2924i, subd. (d)(1).) Civil Code section 2924i, subdivision (c) requires the holder of a loan subject to that statute to provide a written notice setting forth particular information at least 90 days but not more than 150 days prior to the due date of the final payment. But

the section does not apply here because the non-judicial foreclosure was based on a failure to make regular payments, not a balloon payment. Eric and Judy's loan called for a balloon payment upon maturity, but the loan was in default and foreclosure had begun well before the maturity date. Civil Code section 2924i, subdivision (c) does not affect the validity of the trustee's sale under these circumstances.

D

Eric and Alan also contend Rabobank failed to comply with the service requirements of Code of Civil Procedure section 1162.

Code of Civil Procedure section 1161a governs the notice to be provided before a person who is holding over and continuing in possession after a non-judicial foreclosure sale may be removed from the property pursuant to the unlawful detainer procedure. Subdivision (b) of that statute provides that a three-day written notice to quit the property must be served upon the person, as prescribed in Code of Civil Procedure section 1162. Because the purported leases and life estate are not valid for the reasons we have explained *ante*, Code of Civil Procedure section 1161a, subdivision (c) (relating to notice to be provided to a tenant) does not apply. As the trial court found, no valid lease was made to Eric, Judy and/or Alan. Thus, Eric, Judy and Alan were only entitled to the three-day notice to quit, not the longer 90-day notice to quit applicable to tenants or subtenants. (Compare Code Civ. Proc., § 1161a, subd. (b)(3) [applicable to person holding over and continuing in possession after a foreclosure sale] with Code Civ. Proc., § 1161b [applicable to tenants and subtenants] and Pub.L. No. 111-22, § 702 (May 20, 2009) 123 Stat. 1632 (Protecting Tenants at Foreclosure Act) [applicable to "bona fide tenant" and "bona fide lease"].)

The requisite notice may be served (1) by personal service, (2) if the person to be notified is absent from his or her place of residence and his or her usual place of business, by leaving a copy with some person of suitable age and discretion at either place and sending a copy through the mail addressed to the person to be notified at his or her place

of residence, or (3) if the place of residence and business cannot be ascertained or a person of suitable age or discretion there cannot be found, by affixing a copy in a conspicuous place on the property and also delivering a copy to a person there residing, if such person can be found and also sending a copy through the mail addressed to the tenant at the place where the property is situated. (Code Civ. Proc., § 1162, subd. (a).)

Proofs of service signed by Michael Jenkins state that Jenkins personally served Eric with a notice to quit on December 12, 2012, and served Judy and all other occupants in possession of the premises by delivering the notice to a person of suitable age and discretion at the property, after attempting to personally serve them. Jenkins also signed proofs of service showing service of a notice to quit on Eric, Judy and all other occupants in possession of the premises by certified mail, with return receipt requested and first class mail on December 13, 2012. Personal service and substitute service followed by mailing a copy of the notice are proper methods of service. (Code Civ. Proc., § 1162, subd. (a).) Eric admitted he received the December 10, 2012 notice to quit on or about December 12, 2012. Although the proof of service refers to a three-day notice to quit, Eric's testimony establishes that the document served on him was the December 10, 2012 notice to quit from Rabobank's counsel. We do not consider appellants' contention to the contrary, which is made without citation to the record. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246 (*Nwosu*).) Eric's admission that he was served with the notice to quit on or about December 12, 2012, as stated in Jenkins' proof of service, was sufficient to establish proper service under Code of Civil Procedure section 1162. (*Valov v. Tank* (1985) 168 Cal.App.3d 867, 876; *Bank of America National Trust & Savings Assn. v. Button* (1937) 23 Cal.App.2d 651, 652.)

E

Eric and Alan also complain that Rabobank did not serve Alan with any notices directed to him.

Contrary to the factual assertion by appellants, the December 10, 2012, notice to quit states that Eric indicated his "brother may have a lease" but produced no such lease despite requests for the same. Eric and Alan do not cite any portion of the record showing that Rabobank knew Alan's identity or that Alan occupied the premises in 2012, when Rabobank served its notice to quit. Arguments not supported by citations to the record are deemed forfeited. (*Nwosu, supra* 122 Cal.App.4th at p. 1246.)

As we have explained, proofs of service and Eric's testimony showed substitute service of the December 10, 2012 notice to quit on "any other occupants of the Property" on December 12, 2012, followed by mailing a copy of the notice on the same. Substitute service is permitted under Code of Civil Procedure section 1162. (Code Civ. Proc., § 1162, subd. (a)(2).) Further, Alan testified he knew Rabobank was trying to evict all persons on the property. Eric and Alan do not cite any authority for the proposition that Rabobank was required to name Alan in the notice to quit when Alan's identity as an occupant was not established at the time the notice was served. The claim is thereby forfeited. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785.)

F

Eric and Alan further argue the unlawful detainer action is fatally defective because Rabobank did not serve North Star with a 30-day notice as required by Code of Civil Procedure section 1161a, subdivision (c).

Code of Civil Procedure section 1161a, subdivision (c) provides in pertinent part that "a tenant or subtenant in possession of a rental housing unit which has been sold by reason of any of the causes enumerated in subdivision (b) [which includes a non-judicial foreclosure sale], who rents or leases the rental housing unit either on a periodic basis from week to week, month to month, or other interval, or for a fixed period of time, shall be given written notice to quit pursuant to Section 1162, at least as long as the term of hiring itself but not exceeding 30 days, before the tenant or subtenant may be removed therefrom as prescribed in this chapter." Code of Civil Procedure section 1161a,

subdivision (c) does not apply because appellants have not demonstrated the existence of any lease made to North Star as a tenant or subtenant.

G

Eric and Alan also argue the unlawful detainer action was defective because Rabobank did not serve a Code of Civil Procedure section 1161c cover sheet on the Almquists and North Star.

Code of Civil Procedure section 1161c requires notice to be provided to tenants in the case of a foreclosure on a residential property. (Code Civ. Proc., § 1161c, subd. (a).) The notice is not required if the tenant receiving the notice was not a tenant at the time of the foreclosure. (Code Civ. Proc., § 1161c, subd. (a)(3).) Code of Civil Procedure section 1161c does not apply because it has not been established that Eric, Judy, Alan or North Star were tenants at the time of foreclosure.

H

Eric and Alan also challenge the trial court's finding that the reasonable rental value for the two houses on the property was $1,500.

Substantial evidence supports the trial court's finding. The purported leases provided for a monthly rental value of $1,900 for the two houses on the property, indicating what the Almquists regarded as reasonable rent. (*Lehr v. Crosby* (1981) 123 Cal.App.3d Supp. 1, 9.) In addition, Roundtree opined that the rental value of the two residences was $1,500 a month. The trial court found Roundtree, who managed 200 or more properties, had sufficient expertise to opine on rental value.

Eric and Alan claim on appeal that Eric and Judy were entitled to a credit or offset of $700 per month for services they provided to the property since the foreclosure. The claim fails, however, because they do not cite any portion of the record proving the rendition of such services and the value of those services.

II

Eric and Alan next contend the trial court erred in denying the motion to disqualify Rabobank's counsel.

Prior to trial, Eric, Judy, Alan and North Star moved to disqualify Leland, Shultz, Morrisey & Knowles, LLP (Leland), the counsel for Rabobank, on conflict of interest grounds. The trial court denied the motion, concluding there was no concurrent representation by Leland and no substantial relationship between any prior discussions and the unlawful detainer action.

Eric and Alan's contention is not properly before us because they did not immediately appeal or seek writ review of the trial court's order denying their motion to disqualify Leland. An order denying a motion to disqualify counsel is immediately appealable. (*Meehan v. Hopps* (1955) 45 Cal.2d 213, 218; *URS Corp. v. Atkinson/Walsh Joint Venture* (2017) 15 Cal.App.5th 872, 878; *Reed v. Superior Court* (2001) 92 Cal.App.4th 448, 456.) Such an order is not reviewable on appeal from the final judgment. (Code Civ. Proc., § 906 [an appeal from a judgment does not authorize the reviewing court to review an order from which an appeal might have been taken]; *Machado v. Superior Court* (2007) 148 Cal.App.4th 875, 885.)

III

Finally, Eric and Alan claim the trial court erred in granting Rabobank's motion to strike the Almquist's third affirmative defense asserting that the Almquist's leases and life estates were superior to Rabobank's title.

Eric, Judy, Alan and North Star's amended answers to the unlawful detainer complaint and North Star's amended cross-complaint alleged that Eric, Judy and Alan occupied the property since 1991 under oral lease agreements with North Star. Rabobank moved to strike the portions of the amended answers and cross-complaint relating to the purported oral lease agreements. The trial court granted the motion to strike.

Even if the trial court had erred in granting Rabobank's motion to strike, we would not reverse the judgment or order absent a showing that the error was prejudicial. (Code Civ. Proc., § 475; *Wilson v. Sharp* (1954) 42 Cal.2d 675, 679; *Kinard v. Kaelin* (1913) 22 Cal.App. 383, 389.) Here, despite the trial court's order granting the motion to strike, evidence of the alleged oral lease agreements was presented at trial, and the trial court found that the purported leases and life estates were void. Eric and Alan were not prejudiced by the challenged order because the trial court received evidence on the subject and rejected Eric and Alan's assertion that they had valid leases and life estates.

DISPOSITION

The judgment is affirmed. Rabobank shall recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a).)

/S/
MAURO, Acting P. J.

We concur:

/S/
MURRAY, J.

/S/
HOCH, J.